

2014 WL 8392638 (Minn.) (Appellate Brief)  
Supreme Court of Minnesota.

RDNT, LLC, a Minnesota limited liability company, Appellant,

v.

THE CITY OF BLOOMINGTON, a Minnesota municipal corporation, Respondent.

No. A13-0310.

May 20, 2014.

**Respondent's Brief and Addendum**

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## \*1 STATEMENT OF LEGAL ISSUES

**I. When considering RDNT's application for a conditional use permit, was it proper for the City to evaluate whether the application was in conflict with the comprehensive plan, as required by the City's ordinance?**

**a. How the issue was raised in district court.**

The applicability of the comprehensive plan was the subject of cross-motions for summary judgment.

**b. District court's ruling.**

The district court held the City improperly applied the comprehensive plan to this application.

**c. Subsequent preservation for appeal.**

The court of appeals reversed the district court, holding the City properly considered and applied the ordinance requirement that the application not be in conflict with the comprehensive plan.

**d. Apposite authority.**

*Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757 (Minn. 1982) *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320 (Minn. 1981)

**II. Is the City's finding the significant expansion of the facility will be injurious to the adjacent residential neighborhood, which is already overburdened by the existing conditions created by the facility, supported by a rational basis in the record?**

**a. How the issue was raised in district court.**

The impact of the expansion on the adjacent residential neighborhood was the subject of cross-motions for summary judgment in district court.

**\*2 b. District court's ruling.**

The district court held the record did not support the City's finding.

**c. Subsequent preservation for appeal.**

The court of appeals reversed the district court, holding the record supported the City's finding.

**d. Apposite authority.**

[Minn. Stat. § 462.3595, subd. 1](#)

Bloomington, Minn. City Code, § 21.501.04

**III. Did the City properly consider the conditions to mitigate traffic problems proposed by RDNT?**

**a. How the issue was raised in district court.**

The suitability of the proposed conditions was the subject of cross-motions for summary judgment in district court.

**b. District court's ruling.**

The district court held the City improperly rejected RDNT's proposed conditions.

**c. Subsequent preservation for appeal.**

The court of appeals reversed the district court, holding the record supported the City's determination the conditions would not mitigate the traffic problems.

**d. Apposite authority.**

[Minn. Stat. § 462.3595, subd. 1](#)

Bloomington, Minn. City Code, § 21.501.04

**\*3 STATEMENT OF THE CASE**

This matter involves RDNT, LLC's ("RDNT") appeal of the City of Bloomington's ("City") denial of its request for a significant expansion of the Martin Luther Care Campus, which provides various services to seniors and is located adjacent to a low-density residential neighborhood. More specifically, RDNT seeks approval for a 3-story, 67-unit senior assisted living facility, which represents a 62% increase in the floor area of a complex with existing problems with the adjacent residential neighborhood.

Following review by City staff and a public hearing on November 3, 2011, the planning commission recommended denial of the proposal. The city council considered the matter on November 21, 2011, where there was significant discussion about the injurious impact to the residential neighborhood and the project's incompatibility with the comprehensive plan. Ultimately, the city council directed staff to draft a resolution with proposed findings for denial of the proposal. On December 5, 2011, the city council denied the proposal with specific findings of fact.

RDNT challenged the denial in district court. After the submission of the administrative record, the parties submitted cross-motions for summary judgment, which were heard on September 26, 2012, before the Honorable William R. Howard in Hennepin County District Court. On December 18, 2012, the district court granted RDNT's Motion for Summary Judgment, reversing the city council's denial of the proposal and directing the City to issue the appropriate approvals. Judgment was entered on December 19, 2012.

**\*4** The City appealed the adverse decision on February 14, 2013. On January 6, 2014, in an unpublished decision, the Minnesota Court of Appeals reversed the district court and held the City appropriately exercised its discretion, when it denied the conditional use permit. The court of appeals affirmed the City's two separate findings justifying denial of the conditional use permit.

RDNT petitioned this Court for further review on February 5, 2014. This Court granted review on March 18, 2014.

**\*5 STATEMENT OF FACTS**

This appeal involves RDNT's request for a significant expansion of its Martin Luther Care Campus in the city of Bloomington. The care campus has existing facilities for seniors, including Martin Luther Manor and Meadow Woods Assisted Living. AA51. The facilities are located adjacent to an R-1 single family residential zoning district with the sole access on a residential street. AA52. Its only access to an arterial or collector street (Old Shakopee Road) is six blocks away, as illustrated below. RA14-15, 20, 23.

**\*6 1. Property History.**

In 1958, the City approved a conditional use permit for a 120-bed rest home. AA1-2; RA1. There was public opposition to the use at this location, but the city council minutes reflect the city council felt the proposal “would neither lower property value of adjacent property nor generate traffic.” *Id.* In 1969, the City approved a conditional use permit to add a 66-bed infirmary to an existing 120-bed nursing home. AA3; RA2. In 1983, the city council approved a 54,000 square foot addition with 120 additional beds for a total care facility of 218 beds. AA4-9, 50; RA3. There was significant public opposition because of the location of the facility in relation to residential neighborhoods. AA4-8. In 1987, the city council approved an expansion for a 108-unit (117 beds) boarding and lodging facility as part of the existing care facility. AA25; RA4. As part of the approval of the final site and building plans, two of the conditions included “No on-street parking on adjacent public streets shall be allowed” and the facility would “accommodate all of their needs without on-street parking.” AA20-21. The applicant also stated there would only be a total of 800 average daily trips (later traffic studies pegged the actual number at 1,145 trips per day). RA4, 40. Finally, in 2008 the city council approved an application for expansion and removal of an existing building with no increase in beds. AA34-40; RA5.

Prior to submitting its current request, RDNT sought rezoning to facilitate its expansion plans. *Administrative Record*,<sup>1</sup> Tab 3. In the face of opposition at the \*7 planning commission, RDNT withdrew the application and reconfigured the buildings to avoid the need for rezoning. *Administrative Record*, Tab 4; AA49, 84; RA6.

## 2. RDNT's Application.

RDNT proposes a 3-story, 123,055 square foot addition onto the existing 198,209 square foot facility, representing a 62.1% expansion. AA52; RA7. The existing development includes a 137-bed nursing home at Martin Luther Manor and 108 units (117 beds) at Meadow Woods resulting in a total of 254 beds. AA51; RA8. The proposed 67-unit senior catered living facility would contain 17 studio units, 44 one-bedroom units, and 6 two-bedroom units. AA49, 54. Each unit would contain a full kitchen, unlike any of the existing units. AA49. The expansion would also include a wellness center, adult day care, catered and private dining, a club room, lobby, clinic, gift shop, library, meditation room, and other multi-purpose space. AA50.

The proposed structure would connect two existing facilities on the development's south side. AA51. A new underground parking garage would provide 50 underground parking spaces in addition to 162 surface parking spaces. *Id.* This would result in a net increase of 41 parking spaces for the 67-unit expansion. *Id.*

RDNT's application was presented to the planning commission on November 3, 2011. AA148 at 3:3-8. Ultimately, the planning commission recommended denial of the application after agreeing with the staff report that RDNT could not satisfy all of the requirements in the ordinance. AA178 at 122:23-25, 123:1-25, 124:1-6; AA288-289.

\*8 The city council then held a public hearing on November 21, 2011. RA55-58; AA441. There was significant discussion about the project's incompatibility with the adjacent residential neighborhood and the comprehensive plan. RA49-50.

### a. Traffic studies

Because there were significant traffic concerns, the City and RDNT commissioned independent traffic studies. RA50; AA444 at 11:8-12. The SRF traffic study obtained by the City indicated a forecast of traffic generation of 1,377 to 1,447 trips per day; an increase of 302 trips were attributed to the expansion project. RA13, 21; AA93; AA445 at 14:7-14. SRF was able to determine the trip volume specific to this site based on actual hard data and observations, as opposed to a forecast based on the Institute of Traffic Engineers' (ITE) Trip Generation Handbook. AA445 at 14:7-14. The adjacent street otherwise serves low-density single family residential uses. RA11.

SRF also concluded the existing campus generates approximately 4.50 daily trips per bed compared to the ITE average of 2.66 daily trips per bed. *RA33*. SRF used actual observation data and its knowledge of the number of units to determine the actual trip rate. *AA446 at 19:20-25, 20:1-25, 21:1-12*. The traffic engineer noted traffic volumes for the current facility are consistently busy from 6:00 a.m. to 7:00 p.m. *AA448 at 26:58*. This supported the SRF conclusion the campus currently generates trips on the higher end for similar facilities. *RA33*. The study noted an increase of 16 employees would be needed for the expansion, which would contribute to an increase in traffic. *RA35*.

SRF supplemented its traffic study on November 2, 2011, in light of RDNT's revised application. *AA93*. SRF commented on the Transportation Demand Management \*9 Program (TDMP) submitted by RDNT. *Id.* The TDMP instituted programs in 2008 such as a shuttle bus for employees, transit incentives for employees, and promotion of non-motorized commuting. *AA95*. SRF noted the higher rate of 4.50 daily trips per bed was observed with these specific programs in place. *Id.* While SRF noted RDNT proposed adding other TDMP incentives, it noted it was difficult to quantify the effectiveness without post-implementation data and recommended caution when estimating the actual impact to trip reduction. *Id.* SRF's traffic engineer explained:

TDMPs typically tend to be the most effective in central business districts or in heavily transit-oriented developments versus the suburb-type development that this is.

*AA445 at 17:7-10*. He further explained his reasoning for using 4.5 trips per day versus the ITE rate:

Well the 4.5 is within one standard deviation of the average, so it is within reason to use the 4.5 rate that we actually collected. As far as the differences between a nursing home versus assisted living, if you look at the ITE Trip Generation Handbook, all the rates are basically the same.

So we felt we really wanted to provide that conservative estimate, and we didn't really have a justification for lowering the rate down to the average. If this facility is already generating at this rate, we felt that it would continue to generate at that rate.

*AA447 at 22:3-9,11-16*. SRF's traffic engineer advised the city council from a roadway capacity perspective, the existing roadways are wide enough to accommodate the additional traffic. *AA445 at 15:13-20, 17:11-14*. He explained a typical two-lane roadway can handle approximately 12,000 to 14,000 vehicles per day. *AA448 at 27:4-6*. To put the traffic counts into perspective, the council discussed other city streets with \*10 similar traffic counts. *AA448 at 29-33*. These included streets with traffic to Hyland Park and larger schools. *AA449 at 30:15-25, 31:1-15*. The City's traffic engineer advised average traffic counts for a residential street are 300 to 500 trips. *AA449 at 32:8-24*. He also advised when traffic counts exceed 1,000 trips per day on a residential street, the City typically receives complaints about traffic. *AA449 at 32:25, 33:1-4*.

## **b. Density ratios and the comprehensive plan**

The city council evaluated whether the expansion is consistent with the comprehensive plan, as required by the City's ordinance. *AA450 at 34:4-10*. Staff explained the site is guided quasi-public, which allows nursing homes. *AA450 at 34:18-25, 35:1-2*. It is surrounded by land uses such as conservation on the river bluffs to the south and low-density residential to the west, north, and east. *AA450 at 34:22-25*. The sole access to the campus is through the low-density residential neighborhood. Staff advised access requirements for quasi-public uses vary widely and must be evaluated based on the nature of the particular use. *AA450 at 35:3-5*. The comprehensive plan states larger traffic generators should be located adjacent to arterial or collector streets. *AA450 at 35:5-7; AAD95*.

To evaluate whether the facility should be considered a larger traffic generator, staff noted the traffic counts of 1,377 to 1,447 trips per day were comparable to that for 137 to 144 single-family dwellings. *AA450 at 35:11-17*. The neighborhood density directly to the north is 12 homes and the highest-density single-family development was 34. *AA450 at 37:3-10*. Staff also pointed out approximately 90% of all the trips on 13th Avenue south of 99th Street are generated by the campus. *AA450 at 35:18-22*.



Next, \*11 staff showed the council a map of all arterial and collector streets. *AA450 at 35:23-25, 36:1-4; RA22*. The closest arterial or collector street is Old Shakopee Road, six blocks away. *AA450 at 36:5-11*.

Staff also pointed out other provisions of the comprehensive plan which discuss the importance of preserving the character of low-density neighborhoods. *AA451 at 38:5-7*. Staff looked at the increase in density or intensity to evaluate the impact on neighborhood character. *AA451 at 38:7-9*. The proposed addition is a 62% increase in floor area. *AA451 at 38:13-15*. Staff indicated calculating units per acre to compare the expansion with the neighborhood would be difficult based on the number of beds rather than units. *AA451 at 38:16-23*. To help the council put the proposed expansion in perspective, staff looked at floor area ratio, which is the ratio of floor area on a given site to the amount of land on that site.<sup>2</sup> *AA403; AA451 at 38:24-25, 39:1*. The proposed development has a .56 floor area ratio while the residential neighborhood has a .11 floor area ratio. *AA451 at 39:1-6*. Staff opined that intensity impacts neighborhood character. *AA451 at 39:7-12*. Staff also pointed out even if the roads can physically handle the increased traffic, the increase creates a livability and neighborhood character issue. *AA451 at 39:13-17*.

The city council also discussed other nursing home developments with more intense use that were not particularly controversial because they are located on arterial or collector streets, where people expect large traffic generators to be located. *AA452 at \*12 42:17-25, 43:1-10*. Staff contrasted similar projects like Presbyterian Homes and Applewood Pointe. *AA453 at 48-49*. Here, the campus has only one access point, six blocks off an arterial or collector street. *AA453 at 48:20-22*. Staff pointed out the City required Applewood Pointe, which is only two blocks from an arterial street, to put a street in and provide two accesses to the building and to rezone the property. *AA453 at 48:23-25, 49:1-6*.

Staff also explained even though RDNT was code compliant with performance standards, that is just one component of the entire approval process, as set forth in the ordinance. *AA454 at 52:4-8*.

### c. Citizen testimony

The city council heard specific examples about traffic impacts from several neighborhood residents. Resident Victor Johnson lives within 500 feet of the property and testified in opposition to the expansion and conditional use permit. *AA467 at 102:4-11*. Johnson testified residents feel the city street serves as a driveway to the campus. *AA467 at 105:6-9*. Drivers frequently disregard the stop sign at the campus' exit. *AA467 at 105:11-15*. Johnson walks his dog on that street and has personal knowledge it is already very busy:

This is a 24/7 facility. It's not one where you have just high points where the school is open for a short period of time and then it's closed or if the church is opened for a short period of time and then closed. This place is generating traffic that is bad, and now they want to increase that traffic by over 300 trips per day. Frankly, it's way out of proportion to what should be happening in this area.

*AA467-468 at 105:21-25, 106:1-3*.

\*13 Resident Janice Olmsted lives outside the only entrance and exit to the care campus, at the corner of 13th Avenue and 100th Street. *AA468 at 112:8-16, 22-23; AA470 at 119:21-22*. Olmsted testified in opposition to the expansion and showed photographs to the city council of traffic on 13th Avenue. *AA469-470 at 113:11-14, 114:18-23, 115:15-17*. Olmsted explained the parking lots at the care campus fill up and regularly overflow onto the street. *AA468 at 113:17-25, 114:1-17*. Olmsted testified about observing already existing heavy traffic and near accidents at the entrance because drivers leaving the care campus do not anticipate a driver turning left. *AA470 at 117:15-25, 118:1-22*. Olmsted testified about commercial traffic such as shuttles, semi-trucks, and a Coca-Cola truck. *AA471 at 120:15-17*. She showed photographs of this regular commercial traffic on the residential street to the council. *AA471 at 120:20-22*. She pointed out the traffic was not related to the nearby elementary school. *AA471 at 120:23; AA437*.

**\*14** Resident Sherm Harris also testified in opposition and about already experiencing an increase of commercial traffic such as trucks on 100th Street. *AA472 at 123:3-15*. He indicated the facility stopped using its own road for trucks and semis to turn around and those vehicles now use the city street. *Id.* He provided examples of seeing this traffic have difficulty making turns. *AA472 at 124:4-25, 125:1-3*.

Resident Frank Shimkus testified in opposition and asked the city council to follow the planning commission's recommendation to deny the expansion. *AA473 at 125:13-25, 126:1-15*.

Resident Marilyn Hubner testified in opposition to the expansion and corrected RDNT's representation of the neighborhood as mixed use. *AA473 at 126:17-25*. She pointed out traffic for the nearby church and elementary school goes onto Old Shakopee Road, rather than a back road like 13th Avenue or 100th Street. *AA473 at 127:4-11*. Hubner also opined the proposed facility is one that is needed in the City; it is simply proposed for the wrong site. *AA473 at 127:2-4*. She also provided examples of semi-trucks and other traffic backed up waiting to turn left onto Old Shakopee Road from 98th Street. *AA478 at 148:15-25, 149:1-2*.

Resident Mike Olmsted testified in opposition to the expansion. *AA475 at 135:8-16*. In addition to the commercial traffic, he pointed out the volume of fire trucks and ambulances responding to the Manor. *AA476 at 141:11-17*. Sam Olmsted also testified in opposition to the expansion and provided additional examples of noise problems impacting the quality of life in the neighborhood. *AA477 at 146:4-25*. He testified he has woken up from noise from snowplows at the campus. *AA478 at 146:24-25, 147:1-9*.

**\*15** Resident Steve Nyman testified in opposition to the expansion. *AA475 at 149:5-7*. Nyman lives on 13th Avenue across from the elementary school. *AA475 at 149:7-10*. He testified the increase in traffic was already a huge problem and he did not want to see it increase by another 300 trips. *AA479 at 150:2-6*.

The transcript reflects considerable discussion among city council members regarding the information presented. *AA479-482 at 151-165*. Ultimately, the city council passed a motion at the end of the meeting to direct staff to draft a resolution with proposed findings for denial of the CUP for the December 5, 2011 meeting. *RA60*.

### **3. The Denial.**

On December 5, 2011, the city council passed Resolution No. 2011-158 denying the application for the CUP and Resolution No. 2011-159 for denial of the application for final site and building plan approval. *AAD35-55*. The city council made the following findings to support denial of the CUP:

#### **(1) The proposed use conflicts with numerous sections of the Comprehensive Plan.**

**a. The proposed use constitutes a large traffic generator and as such should be located adjacent to a collector or arterial street.**

**b. The proposed new addition to this senior living facility constitutes high-density housing, and as such, should be located near transit, amenities, services and employment.**

**c. The proposed use would negatively impact the character of the surrounding low density neighborhood.**

(2) The proposed use is not in conflict with any adopted District Plan for the area because it is not part of any District Plan.

(3) The proposed use is not in conflict with City Code provisions in that the expansion as proposed would be in compliance with performance standards.



**\*16** (4) The proposed use will not create an excessive burden on parks, schools, streets and other public facilities and utilities which serve or are proposed to serve the planned development.

**(5) The proposed use will be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare.**

AAD39-42 (*emphasis supplied*). This appeal ensued.

### SUMMARY OF ARGUMENT

The City properly considered whether RDNT's expansion was in conflict with the comprehensive plan, as required by the City's ordinance. The record supports the City's findings the facility constitutes a large traffic generator and is not located adjacent to a collector or arterial street; it constitutes high-density housing and is not located near transit or services; and it would negatively impact the character of the adjacent residential neighborhood.

The record also supports the City's finding the expansion would be injurious to the surrounding neighborhood. The care campus currently generates a volume and type of traffic not normally associated with the surrounding low-density residential neighborhood. The expansion would significantly exacerbate the already adverse conditions created by the care campus. The city council relied on concrete testimony and specific examples from neighborhood residents regarding the impact of the volume and type of traffic.

The City properly considered mitigating conditions and was within its discretion to evaluate the likelihood RDNT's conditions would alleviate the City's legitimate **\*17** concerns. Accordingly, the court of appeals' decision upholding the City's denial of the conditional use permit should be affirmed.

### STANDARD OF REVIEW

Municipal land use decisions are entitled to a deferential standard of review. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993). A city's denial that is based on a legally sufficient reason and supported by a factual basis is not unreasonable, arbitrary, or capricious. *C.R. Invs., Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). Appellate courts defer to municipality's decision when the factual basis for the denial has even the "slightest validity." *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982). RDNT has the burden to persuade the Court that the City's reasons for denial were improper. *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

### ARGUMENT

#### **I. THE CITY PROPERLY CONSIDERED WHETHER RDNT'S APPLICATION WAS IN CONFLICT WITH THE COMPREHENSIVE PLAN, AS REQUIRED BY THE CITY'S ORDINANCE.**

Conditional use permits are flexible devices designed to accommodate situations in which a land use that is generally compatible with the controlling zoning classification raises challenges inherent in the use itself or creates special problems **because of the proposed location of the use**. See *Zylka v. City of Crystal*, 167 N.W.2d 45, 48 (Minn. 1969). Such potential challenges or problems justify a local government to require special permission, with any necessary conditions as detailed in its zoning ordinance, for **\*18** the proposed use. *Zylka*, 167 N.W.2d at 49. Thus, conditional use permits are not granted as a matter of right. *Id.* Rather, the governmental body may first weigh such factors as traffic congestion, population density, noise, the use's effect on land values, and other considerations that implicate public health, safety, or the general welfare. *Id.* Pursuant to state statute, the City retains discretion to approve or deny a conditional use permit and the burden is on RDNT to demonstrate compliance with the criteria in the ordinance. Minn. Stat. § 462.3595, subd. 1 provides:

Conditional uses *may* be approved by the governing body... *by a showing by the applicant* that the standards and criteria stated in the ordinance will be satisfied.

(Emphasis supplied); *see also Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004). A city's denial of a conditional use permit is not arbitrary when at least one of the reasons provided satisfies the rational basis test. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997).

#### **A. The City properly considered the comprehensive plan.**

The City's ordinance expressly requires the City to consider whether an application is in conflict with the comprehensive plan. Nonetheless, RDNT asserts the City could not consider its comprehensive plan because it was not adopted through official controls. *App.'s Br. pp.* 25-28. It is well-established if a city's ordinance requires consideration of a comprehensive plan when evaluating a conditional use permit application, incompatibility between the proposed use and the comprehensive plan is a \*19 legally sufficient basis for denial of the permit. *See Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

In *Hubbard Broadcasting*, this Court held inconsistency with the comprehensive plan based on “intention to preserve and enhance the low density residential agricultural character of the community and its scenic beauty” was a legally sufficient reason to deny a conditional use permit. 323 N.W.2d at 762-63. Hubbard sought a special use permit to construct a satellite communication and receiving tower, equipment building and antennae on land zoned for agriculture and low-density residential development. *Id.* at 759, 762. The Afton comprehensive plan directly expressed the intention to preserve and enhance the low-density residential-agricultural character of the community and its scenic beauty. *Id.* at 762. The plan also had a policy strongly discouraging strip and spot commercial development and encouraging non-residential development in a particular area. *Id.* The Court agreed the permit could be denied for reasons relating to public health, safety and general welfare or because of incompatibility between the proposed use and a municipality's comprehensive plan. *Id.* at 763 (citing *C.R. Investments, Inc.*, 304 N.W.2d at 324). The Court concluded the city's finding regarding incompatibility with the comprehensive plan had evidentiary support and was within the city's informed discretion when interpreting the plan. *Id.*

Similarly, in *SuperAmerica Group v. City of Little Canada*, 539 N.W.2d 264 (Minn. App. 1995), the court of appeals previously upheld the denial of an application for a conditional use permit that was inconsistent with a comprehensive plan. *Id.* at 266. SuperAmerica applied for a conditional use permit to construct a new facility. *Id.* While \*20 there were preexisting traffic problems on a street, the city was persuaded by an independent traffic consultant's finding it would be difficult to complete left turns during peak traffic. *Id.* SuperAmerica's traffic consultant also supported these conclusions but reported the site was capable of supporting the proposed use. *Id.* Numerous residents and local business owners testified against the permit due to probable traffic aggravation and concerns relating to crime and pollution. *Id.*

The city's comprehensive plan called for restriction of commercial development at street intersections and prevention of overcrowding and over-intensification of land use. *Id.* at 267. The court of appeals found the record demonstrated the gas station would be located at a busy intersection which already experienced heavy traffic congestion, left turns were extremely difficult during peak periods, and the nearby freeway ramp was operating at an estimated 90% traffic capacity. *Id.* Thus, the court determined the city did not act unreasonably, arbitrarily, or capriciously in denying the application for the CUP. *Id.* at 268.

RDNT attempts to distinguish *SuperAmerica Group* because the city of Little Canada adopted a city code provision with a legitimate land use objective of avoiding additional traffic congestion. A city may not base the denial of a conditional use permit on land use standards that are “unreasonably vague” or “unreasonably subjective.” *C.R. Invs., Inc.*, 304 N.W.2d at 327-28. Here, however, the City's ordinance specifically requires consideration of whether the proposed use is in conflict with the comprehensive plan. Bloomington, Minn. City Code, § 21.501.04 (2009) (*available at AAD56-57*); *see also Amoco Oil Co.*

*v. City of Minneapolis*, 395 N.W.2d 115, 118 (Minn. App. 1986) \*21 (holding reliance on comprehensive plan as basis for denying conditional use permit was improper when zoning ordinance did not list compliance with comprehensive plan as basis for denial).

RDNT also relies on *C.R. Investments, Inc.*, in which this Court determined Shoreview's requirement an applicant demonstrate a proposed use was an "improvement" on the comprehensive plan and was consistent with the undefined general intent and purpose was unreasonably vague. 304 N.W.2d at 327-28. The court also determined whether a use was an "improvement" was unreasonably subjective. *Id.* at 328. Here, the City's ordinance properly requires consideration of whether the proposed use is in conflict with the comprehensive plan. AAD56-57. As discussed more fully below, the standards relied on by the City are objective standards and not unreasonably subjective.

RDNT also relies on *PTL, L.L.C. v. Chisago County Bd. of Comm'rs*, 656 N.W.2d 567, 573 (Minn. App. 2003) to support its argument the City could not rely on the comprehensive plan because it was not an official control. RDNT, however, quotes *PTL* out of context. *App.'s Br.* 27-28. The full quote is:

Regulatory standards must be sufficiently precise to ensure the application of objective standards to all similarly situated property to adequately inform landowners of the requirements they must satisfy to gain **subdivision approval**, and to allow a reviewing court to evaluate noncompliance.

656 N.W.2d at 572 (emphasis added). The quote is supported by citations to cases addressing preliminary-plat approvals. This distinction is important because the level of discretion for consideration of a conditional use permit is broader than consideration of \*22 approval of a preliminary plat. Indeed, one does not have to look further than *PTL* to understand this distinction.

*PTL* distinguishes the discretion to a local government and application of a comprehensive plan when considering a **conditional use permit** compared to a preliminary plat approval falling within a **permitted use**. 656 N.W.2d at 573-74. Citing Minn. Stat. § 394.22, subd. 7, the court of appeals stated: "Compatibility with the public's health, safety, and welfare of the local government's comprehensive land-use plan is an appropriate consideration in approving an application for a **conditional use**." *Id.* at 573. Section 394.22, subd. 7 defines conditional uses for counties and, like the City's ordinance, requires conformity to the comprehensive plan. The court of appeals further contrasted applying a comprehensive plan to preliminary plat approval: In contrast, for a **permissible** use, the law recognizes that 'when a city designates a specific use as permissible in a particular zone or district, the city has exercised its discretion and determined that the permitted use is consistent with the public health, safety, and general welfare and consonant with the goals of its comprehensive plan.'

*Id.* at 574 (quoting *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984)). Thus, *PTL* confirms the City could properly consider its comprehensive plan when considering RDNT's conditional use permit proposal.

## **B. The project conflicts with the comprehensive plan.**

The City found the proposed expansion conflicts with several provisions of the comprehensive plan. Metropolitan cities' comprehensive plans contain objectives, \*25 policies, standards, and programs to guide public and private land use.<sup>3</sup> Minn. Stat. § 473.859, subd. 1. The City's implementation of its comprehensive plan includes taking the plan into consideration when making land use decisions, amendments to ordinances, and other actions taken by the City. AAD80.

While the provision of senior housing is a goal of the City, the problem here was the **location** of the proposed facility, which would result in increased traffic which would further exacerbate existing problems with the adjacent low-density residential neighborhood. The City identified three conflicts with the comprehensive plan:

a. The proposed use constitutes a large traffic generator and as such should be located adjacent to a collector or arterial street.

- b. The proposed new addition to this senior living facility constitutes high-density housing, and as such, should be located near transit, amenities, services and employment.
- c. The proposed use would negatively impact the character of the surrounding low density neighborhood.

AAD39-42. Each of these conflicts represents an independent and legally sufficient reason to deny the application, which is supported by substantial evidence in the record.

**1. The record supports the City's findings the proposed use constitutes a large traffic generator and is not located adjacent to a collector or arterial street.**

First, the City determined the proposed use constitutes a large traffic generator and as such, should be located adjacent to a collector or arterial street. AAD39. This was a \*24 direct application of the City's comprehensive plan which was adopted in 2008. RDNT argues this provision does not apply because it is not changing its land use designation. *Appellant's Brief*, p. 29. The comprehensive plan, however, does not limit the application of this provision only to a zoning change. *See ADD94*. As the court of appeals reasoned:

The comprehensive plan indicates that the larger-traffic-generator provision is a prerequisite for approval of a CUP application. The plan states that the city may approve a 'development proposal' only if it complies with both 'applicable zoning' and 'future land use designation[s].' Thus, the plan required the city council to determine, before approving RDNT's CUP application, whether the proposed expansion would comply with its quasi-public designation. Accordingly, the phrase 'future land use' encompasses a future expansion of current land use. Therefore, this provision of the plan is a legally sufficient basis for denying the CUP application.

*RDNT, LLC v. City of Bloomington*, 2014 WL 30382, \*4 (Minn. App. 2014). The comprehensive plan provides:

Access requirements of quasi-public uses vary widely and must be evaluated according to the nature of the particular use. Larger traffic generators should be located adjacent to arterial or collector streets.

AAD95; RA11-12; Bloomington, Minn. City Code, ch. 19, § 19.27(d)(5) (*available at RADD2*).

There is substantial evidence the campus is already a large traffic generator based on the existing traffic count of 1,145 vehicles per day. The expansion would increase the traffic count from between 1,377 to 1,447 trips per day. RDNT criticizes the City's reliance on the use of the **actual** traffic rates utilized by SRF, rather than using estimates \*25 from the Institute of Traffic Engineers (ITE) used by URS. <sup>4</sup> *App.'s Br. 11*. It is difficult to understand how utilizing the actual trip data is somehow inappropriate or less accurate than a statistical model. The SRF study verified the actual vehicles coming and going to the facility and then used that number to calculate the number of additional trips that would be generated from the expansion on a proportional basis. SRF's traffic engineer explained his reasoning for using 4.5 trips per day versus the ITE rate and opined he did not "have a justification for lowering the rate down to the average" and believed it would continue to generate a higher level of traffic than set forth in the ITE Trip Generation Handbook, all the rates are basically the same. AA447 at 22:3-9, 11-16. In short, SRF's approach was reasonable and accurate. Accordingly, the City properly utilized the actual trip data when evaluating the impact of the expansion of the facility.

As the City's traffic engineer pointed out, average traffic counts for a residential street are normally 300 to 500 trips. AA449 at 32:8-24. He also pointed out when traffic counts exceed 1,000 trips per day on a residential street, it triggers traffic complaints

from the public. AA449 at 32:25, 33:1-4. The facility already generates over 50 percent of all traffic on West 98th Street, east of 11th Avenue, and over 90 percent of the trips on 13th Avenue south of 99th Street. AA283.

RDNT takes the city engineer's reference to other streets with similar trip volumes out of context. *Appellant's Brief*, at p. 39 (citing AA449 p. 30). The council asked the city engineer to put the 13th Avenue trip volume into perspective compared to other \*26 streets with that level of traffic. AA448 at 29:19-25, 30:1-14. The city engineer referenced Nine Mile Creek Parkway (1,800 trips) and Chalet Road (1,700 trips) as streets with similar volumes. AA449 at 30:15-21. These are streets in different areas of the City and by no means indicative of typical residential streets in the City. To the contrary, the record demonstrates 300 to 500 trips is a residential average and streets exceeding 1,000 trips are problematic to neighborhoods. The record also does not establish whether those counts are attributable to the use of those streets as shortcuts (such as Stanley Avenue and Nine Mile Creek Parkway), purely residential, or particular use traffic or the level of complaints for those streets.

RDNT also points to the city engineer's statement the average number of trips on a residential street near a school is 900 to 1,200 per day. AA449 at 32:13-16. RDNT implies the traffic counts in this area are attributable to the school. Primary access to the school, however, is on 98th Street and the traffic count on that street was 2,390 before the proposed expansion and 2,660 after. RA10, 41. More importantly, the school has little impact on the residential neighborhood immediately adjacent to the facility.

RDNT's reliance on the City's prior approval of Applewood Pointe is unavailing for several reasons.<sup>5</sup> While RDNT references higher traffic counts for Applewood Pointe, this traffic study was conducted by RDNT's engineer after the city council made its decision. AA512; AA486. Nonetheless, Applewood Pointe is not a comparable \*27 development. It is a 48,000 square foot senior co-op building, not a proposed 321,264 square-foot licensed care facility. AA500. At the referenced location near 82nd Street and Penn Avenue (there are two campuses in the City of Bloomington), Applewood Pointe was required to put in two accesses and extend Russell Avenue. AA453 at 48:23-25, 49:1-6; AA500. Applewood Pointe also went through rezoning for planned development. RA453 at 49:4-6; AA508. Significantly different is Applewood Pointe's proximity to the commercial district of Penn Avenue and American Boulevard, an amenity for senior residents. AA503, 506-507. There is also an adjacent office building. AA507. Simply stated, Applewood Pointe was located in an appropriate location to handle the nature of traffic it generated.

The record is clear RDNT is already a large traffic generator and a 26% increase is not a minimal increase. RDNT is the largest traffic generator in the half mile of low density residential neighborhood before drivers reach a major arterial street. RDNT suggests the record does not conclusively connect traffic issues identified by area residents to the facility. Perhaps if the campus was located elsewhere, this argument would have some merit. But looking at its location, there can be no other conclusion the non-residential traffic is from RDNT. The school and church have their primary access points on 98th Street and Old Shakopee Road. There is no apparent reason for traffic to those locations to drive on 13th Avenue or 100th Street, the problem locations in the neighborhood. Janice Olmsted testified the photographs she took of traffic were not related to the elementary school. AA471 at 120:23; AA437. Moreover, the photographs Olmsted showed to the city council show commercial trucks entering RDNT's property. \*28 See AA439 (semi-truck entering); AA440 (Coke truck entering). Olmsted also testified about seeing employees in uniforms walking over the berm from their vehicles parked on the street. AA471 at 119:13-22.

RDNT further argues the comprehensive plan does not require larger traffic generators to be located adjacent to a collector or arterial street since the provision uses the word "should." *Appellant's Brief*, p. 33. The use of "should" does not change the rational basis of the conclusion of whether the expansion is inconsistent with this provision.

The nearest arterial or collector street is East Old Shakopee Road which is six residential blocks or approximately half a mile away from the development site. RA14-15. All access to the site is through residential streets. RA23. As a large traffic generator, any expansion of the facility which significantly increases traffic volume is inconsistent with this provision of the comprehensive plan.



The proposed use of providing senior housing was not the problem with this application, as the City's comprehensive plan recognizes the need for senior housing and encourages the development of facilities to accommodate an aging population. *AAD110*. Rather, the problem with the proposal was the location of the facility which would result in increased traffic on residential streets by the expansion and the significant distance from a collector or arterial street.

**\*29 2. The record supports the finding the proposal constitutes high-density housing and it is not located near transit or services.**

Second, the City determined “the proposed new addition to this senior living facility constitutes high-density housing, and as such, should be located near transit, amenities, services and employment.” *AAD40*. This comports with the comprehensive plan to “encourage most new housing, especially high-density housing, to locate near transit, amenities, services, and employment.” *Comprehensive Plan, Goal 2 (AAD120)*. The City determined the proposed structure would be high-density housing. *AAD40*. The proposed addition would result in up to 16 units per acre. *AA454 at 50:18-21*.

As previously explained, RDNT did not simply seek to add nursing home beds. It is adding a new type of senior housing, essentially 67 apartments. The primary difference between the proposed units and a multi-family development is state licensing and residents obtaining health care. For land use purposes, staff had to evaluate the impact of the addition of 67 apartment-like units. By using floor area ratios, they found an effective way to illustrate intensity of use for the council. The expansion would have a floor area ratio of 0.56 in contrast to surrounding single family homes with a floor area ratio of 0.11 and would result in a 62.1% increase in floor area. *AA153 at 24:3-21; RA19*. The city council reasonably determined this type of use has a greater need to be located near amenities such as gas stations, food services, transit and convenience stores, based on the size of its workforce and additional visitor traffic.

The record shows the location is not near transit which is approximately half a mile away on East Old Shakopee Road. *AAD40; RA17*. Staff referred the council to a \*30 Metro Transit map which shows the distance to transit. *AA450 at 37:25, 38:1-4*. It is also not near services or other amenities that might reduce the number of trips generated and other amenities are located over one mile from the development site at East Old Shakopee Road and Old Cedar Avenue. *AAD40-41*. Staff pointed out proximity to services and amenities would be important for visitors and employees, in response to arguments they were not important for residents. *AA450 at 37:14-24*. The record supports the City's determination the new addition is not consistent with the comprehensive plan provision requiring that high-density housing be located near transit, amenities, services, and employment.

**3. The record supports the finding the proposed use would negatively impact the character of the surrounding neighborhood.**

Finally, the City determined “the proposed use would negatively impact the character of the surrounding low density neighborhood.” *AAD41*. RDNT argues the comprehensive plan provisions regarding preserving the character of low-density residential neighborhoods does not apply to the expansion. This finding relied on the comprehensive plan core strategic direction to “preserve the character of low density neighborhoods.” *AAD79, 83*. Moreover, it is clear from the use of the roads in this area the neighborhood immediately adjacent to RDNT is low-density residential. The school and church traffic goes to 98th Street and Old Shakopee Road.

A careful review of the nature of the prior use and land use approvals is necessary to put the current proposal in the proper context. Since starting as a 120-bed rest home in 1958, Martin Luther Manor grew to 218 beds in 1983. *AA1-2, 4-9, 50; RA1, 3. Meadow \*31 Woods*, a 108-unit expansion for a senior citizen board and lodging facility with 117 beds, was approved in 1987. *AA25; RA4*. These units did not have kitchens. *AA462 at 85:4-7*. RDNT tries to minimize the intensity and impact of the proposed expansion by arguing it is staying within its approved bed counts. Bed counts are for state licensing purposes. The bed capacity under the prior conditional use was 335 until RDNT de-licensed nursing home beds through the State of Minnesota, reducing occupancy to 254 beds. *AA458 at 69:13-18; AA462 at 82:16-25, 83:1*. The proposed expansion of 67



units with kitchens would result in 335 beds for state licensing purposes, including 175 independent dwelling units. AA49. In other words, RDNT is not simply seeking to add beds back into the existing facility, it is increasing the size and intensity of the facility to accommodate its new configuration.

RDNT's focus on prior licensed beds, as opposed to the nature of the expansion, fails to take into consideration the intensity of the expansion. The proposed 123,055 square foot addition onto the existing 198,209 square foot facility would result in a total of 321,264 square feet, a 62.1% expansion.<sup>6</sup> AA52; RA7. While there is no floor area ratio requirement in the City Code, staff used floor area ratio to illustrate the intensity of use compared to the immediate neighborhood because RDNT presented the proposal as two units with 254 beds. AA403. The expansion would have a floor area ratio of .56 in contrast to the surrounding neighborhood floor area ratio of 0.11. AA153 at 24:3-21. In \*32 other words, the expansion would result in a much more intense use of the property, as compared to the adjacent residential neighborhood.

The record also shows discussion about more independent residents occupying units with full kitchens would generate more traffic than a nursing home, such as trips to the grocery store or other errands. RA50; AA446 at 20:2-8, AA447 at 22:17-25, 23:1-3. These units are more like apartments than what is commonly considered as nursing home rooms. The City properly considered the nature of the expansion when it considered the impact on the character of the surrounding neighborhood.

It is undisputed the proposed expansion will increase traffic volumes, directly impacting the adjacent residential neighborhood. The record is clear here there is already a significant traffic problem when trip rates are compared to average residential trip rates of 300 to 500. Adding a 26% increase will lead to a cumulative negative impact on the character of the surrounding neighborhood.

RDNT also argues the City ignored expert testimony from traffic engineers and instead focused on neighborhood testimony. App.'s Br. 41-42. A city may disregard an expert's opinion when it is presented with conflicting non-expert's opinions, including opinions of neighborhood residents, when the reasons are concrete and based on observations, as opposed to fear or speculation. *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 260 (Minn. App. 2004); *BBY Investors v. City of Maplewood*, 467 N.W.2d 631, 635 (Minn. App. 1991), review denied (Minn. May 23, 1991).

The cases cited by RDNT are distinguishable and the record shows the traffic studies and neighborhood testimony about impacts to the neighborhood (as opposed to \*33 the physical capacity of the roadway) are not inconsistent. RDNT cites *C.R. Investments, Inc. v. Village of Shoreview*, where the Minnesota Supreme Court noted the denial of a special use permit for reasons related to traffic would have been legally sufficient if the record demonstrated a factual basis for them. 304 N.W.2d 320, 325 (Minn. 1981). There was, however, nothing in the Village of Shoreview's record regarding traffic except the city planner's report the road could accommodate traffic and a driveway turnaround could be constructed. *Id.* at 323.

RDNT next cites *Chanhassen Estates Residents Association v. City of Chanhassen*, where the city council approved a conditional use permit application for a McDonald's drive-thru after the city planner and engineer recommended approval and provided specific recommendations regarding traffic management. 342 N.W.2d 335, 338 (Minn. 1984). A residents association appealed the approval. The opinion does not explain the non-specific testimony regarding potential traffic hazards cited by the group. *Id.* at 340. Thus, *Chanhassen* does not offer guidance to this court for analyzing whether neighborhood testimony here was not concrete and specific enough.

The City reviewed traffic studies from third parties and heard from its city engineer average residential streets have 300-500 trips per day. During the lengthy November 21, 2011 public hearing, the council heard significant testimony from neighbors who had concrete knowledge and information regarding the existing traffic problems on the residential streets. AAD42; AA467-479. Residents presented photographs from the neighborhood which showed congestion existing on 13th Avenue at various times of the week and times of day. The photographs showed parking on both \*34 sides of the street, overflow parking from the site, illegal parking and large vehicle traffic. AAD42; *Administrative Record*, Tab 22; AA425-438.

It is well-established the City may consider neighborhood opposition if it is based on concrete evidence. See *Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d at 728; *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988). In *SuperAmerica Group*, the court of appeals discussed the record of residents providing information of existing daily traffic problems. 539 N.W.2d at 268. The court noted the residents expressed more than a vague concern about future neighborhood problems. *Id.*

RDNT and its amici curiae cite *Yang v. County of Carver*, where the county denied a conditional use permit application to operate a custom slaughterhouse, largely based on its findings it would generate excessive traffic on a gravel road. 660 N.W.2d 828, 832 (Minn. App. 2003). The county heard anecdotal comments with no detail about vehicle traffic and no information about how the traffic might affect general welfare. Moreover, the traffic counts were fairly nominal compared to the existing conditions at the care facility. As a result, it is not surprising the court overturned the county's CUP denial.

Unlike *Yang*, the record here demonstrates the neighborhood testimony here was more than anecdotal comments and vague, generalized concerns. Neighbors provided specific examples of the volume of traffic and the difficulties large delivery trucks had maneuvering turns on the residential streets. AA467-479. The City found the testimony and photographs presented by the public were credible and consistent with the traffic studies presented. AAD42. Neighborhood residents provided photographs demonstrating \*35 the existing congestion issues; never-ending hours of operation and traffic; and examples of traffic safety issues regarding drivers ignoring an existing stop sign and failing to yield at the T-intersection at 13th Avenue and 98th Street. <sup>7</sup> AA467 at 105:17-25, AA469 at 113:17-25, 114:1-17, AA471 at 117:15-25, 118:1-22, AA474 at 127:21-25. Specific examples and personal accounts provide concrete evidence on which the City can rely. As area residents, they had sufficient "competency and personal knowledge" to discuss traffic concerns. See *Corwine v. Crow Wing County*, 244 N.W.2d 482, 491 (Minn. 1976). Indeed, the district court agreed there was specific evidence presented by residents and the City properly considered it as evidence. AAD33. This is no different than the City of Little Canada relying on personal accounts of residents in *SuperAmerica Group*, 539 N.W.2d at 268.

RDNT failed to rebut the specific and concrete testimony of citizens at the public hearing regarding the intensity of traffic or that the traffic and parking issues were not attributable to RDNT and its employees, residents, visitors, and vendors. *Roselawn Cemetery*, 689 N.W.2d at 260 (discussing applicant's failure to rebut concrete neighborhood testimony). The City was entitled to take this into consideration when evaluating the credibility of citizen testimony.

Relying on neighborhood testimony regarding impact to quality of life is not the same as evaluating the physical capacity of the road, regardless of its surroundings. \*36 Rather than view road capacity in a vacuum, the City properly considered neighborhood impact, as its ordinance requires. Moreover, unlike the cases cited by RDNT, City staff recommended denial and the independent traffic engineers did not opine whether the project should be approved or denied.

The expansion will exacerbate existing compatibility problems with the adjacent low-density residential neighborhood. Consequently, the City had a factual basis to support its finding the proposal would negatively impact the adjacent low-density residential neighborhood, which conflicts with the comprehensive plan.

## **II. THE PROPOSED EXPANSION WILL BE INJURIOUS TO THE ADJACENT LOW-DENSITY RESIDENTIAL NEIGHBORHOOD, WHICH IS ALREADY ADVERSELY IMPACTED BY EXISTING CONDITIONS CREATED BY THE CARE CAMPUS.**

The City's ordinance also precludes approval of a conditional use permit if the proposed use will be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare. Bloomington, Minn., ch. 21 art. V § 21.501.04(e) (2009) (available at AAD56). Protection of general public health, safety and welfare is a valid basis to deny a conditional use permit. *Roselawn Cemetery*, 689 N.W.2d at 260; *SuperAmerica Group*, 539 N.W.2d at 267. The City determined the proposed use will be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare. AAD41. RDNT bears

the burden of demonstrating its expansion will not be injurious to the surrounding neighborhood. See [Minn. Stat. § 462.3595, subd. 1](#).

After a thorough review of the current proposal, City staff concluded:

[T]he proposal will be injurious to the surrounding neighborhood. The proposed development is significantly different in massing, floor area and \*37 scale from the single family dwellings to the north. The traffic forecast for the proposed development is over four times that of a comparable single family housing development. These characteristics are significant enough to be injurious to the single family neighborhood to the north.

AA283. This finding alone supports the City's denial of the conditional use permit. See [Trisko, 566 N.W.2d at 352](#).

The care campus already generates significant traffic in terms of the amount and type of traffic. As the City's traffic engineer pointed out, average traffic counts for a residential street are normally 300 to 500 trips. AA449 at 32:8-24. He also pointed out when traffic counts exceed 1,000 trips per day on a residential street, it triggers traffic complaints from the public. AA449 at 32:25, 33:1-4. The facility already generates over 50 percent of all traffic on West 98th Street, east of 11th Avenue, and over 90 percent of the trips on 13th Avenue south of 99th Street. AA283. While the streets have the physical capacity to support the increase in traffic, this does not mean the increase in traffic is without consequences to the neighborhood.<sup>8</sup> Looking only to road width ignores the evidence in the record of congestion, near accidents, traffic at all times of the day, and commercial vehicles not typical of a residential neighborhood.

As previously discussed, RDNT takes the city engineer's reference to other streets with similar trip volumes out of context. *Supra*, p. 25. The record demonstrates 300 to 500 trips is a residential average and streets exceeding 1,000 trips are problematic to \*38 neighborhoods. The record also does not establish whether those counts are attributable to the use of those streets as shortcuts (such as Stanley Avenue and Nine Mile Creek Parkway), purely residential, or particular use traffic or the level of complaints for those streets.

RDNT also incorrectly attributes traffic counts to the school and takes the physical capacity of the road out of context. *Supra*, p. 26. While the city engineer did advise the road could handle 12,000 to 14,000 vehicle trips per day, it would be absurd to suggest any residential neighborhood could endure that level of traffic. Focusing on physical capacity ignores the evidence in the record of traffic congestion that is incompatible with a low-density residential neighborhood.

Next, RDNT argues an increase in traffic alone does not evidence harm to the neighborhood. *App.'s Br. 40*. The record is clear here there is already a significant traffic problem when trip rates are compared to average residential trip rates of 300 to 500. Adding a 26% increase will lead to a cumulative injurious effect on the surrounding neighborhood.

As previously discussed, the record conclusively connects traffic issues identified by area residents to the facility. *Supra*, p. 32-33. And the City properly considered concrete testimony from residents. *Id.* The City reviewed traffic studies from third parties and heard from its city engineer average residential streets have 300-500 trips per day. During the lengthy November 21, 2011 public hearing, the council heard significant testimony from neighbors who had concrete knowledge and information regarding the existing traffic problems on the residential streets.

\*39 Neighbors provided specific examples of the volume of traffic and the difficulties large delivery trucks had maneuvering turns on the residential streets. AA467-479. The City found the testimony and photographs presented by the public were credible and consistent with the traffic studies presented. AAD42. Neighborhood residents provided photographs demonstrating the existing congestion issues; never-ending hours of operation and traffic; and examples of traffic safety issues regarding drivers ignoring an existing stop sign and failing to yield at the T-intersection at 13th Avenue and 98th Street. AAD42; *Administrative*

*Record, Tab 22; AA425-438; AA467 at 105:17-25, AA468 at 113:17-25, 114:1-17, AA470 at 117:15-25, 118:1-22, AA473 at 127:21-25.*

RDNT failed to rebut the specific and concrete testimony of citizens at the public hearing regarding the intensity of traffic or that the traffic and parking issues were not attributable to RDNT and its employees, residents, visitors, and vendors. The City was entitled to take this into consideration when evaluating the credibility of citizen testimony.

Relying on neighborhood testimony regarding impact to quality of life is not the same as evaluating the physical capacity of the road, regardless of its surroundings. Rather than view road capacity in a vacuum, the City properly considered neighborhood impact, as its ordinance requires.

The particular use of this property as a nursing home and senior living facility currently generates a type of traffic not normally associated with low-density single-family residential neighborhoods, including large truck deliveries, semi-trailer truck deliveries, emergency vehicle visits, frequent van trips, and employee and visitor trips. \*40 The City determined this type of traffic is generally noisier and more disruptive of the quiet enjoyment of the residences in the neighborhood. AAD39. Based upon the record, the City reasonably concluded a significant expansion of the care campus would exacerbate the current adverse impacts experienced by the adjacent residential neighborhood. It was appropriate to consider the cumulative effects of the intensification of the use at the care campus on existing adverse effects. See [SuperAmerica Group, 539 N.W.2d at 266](#) (affirming denial of conditional use permit for use that would increase already existing traffic problems).

RDNT argues the City should have relied on its promise commercial vehicle traffic like delivery trucks would not increase. AA463 at 88:1-5. RDNT argues there is no evidence in the record to support a finding the expansion would increase commercial and emergency vehicle traffic. *App.'s Br. 40*. How RDNT can suggest adding additional residents will not increase a need for emergency traffic is perplexing. And RDNT's cite to its claim it would not increase commercial traffic is unavailing. The City properly discredited that claim. The proposed expansion includes a wellness center, adult day care, catered and private dining, a club room, clinic, and gift shop, among other amenities. AA50. It was reasonable for the City to be critical of RDNT's claim when such amenities would normally lead to an increased need for commercial traffic. Additionally, the City was also concerned about an increase in emergency vehicle traffic. Given the nature of the proposed expansion, it was reasonable for the City to conclude such traffic would increase.

\*41 Because the City's determination the proposed use would be injurious to the surrounding neighborhood is supported by a rational basis, with a factual basis in the record, and the city council had discretion to make reasonable inferences and weigh credibility of evidence and testimony presented to it, the City's denial of RDNT's application should be affirmed.

### III. THE CITY PROPERLY CONSIDERED AND REJECTED THE CONDITIONS SUGGESTED BY RDNT.

RDNT and its amici curiae<sup>9</sup> assert the city council arbitrarily denied the application without adequate consideration of mitigation measures implemented through conditions of approval. They are mistaken.

As a preliminary matter, neither state statute nor the City's ordinance puts the burden on the City to suggest suitable conditions, which would adequately address the adverse impacts from the expansion project. [Minn. Stat. § 462.3595, subd. 1](#) provides:

Conditional uses *may* be approved by the governing body... *by a showing by the applicant* that the standards and criteria stated in the ordinance will be satisfied.

(Emphasis supplied). Simply stated, the burden is squarely on the applicant to demonstrate it can satisfy the ordinance provisions, not the City.

\*42 RDNT and its amici curiae's reliance on *C.R. Investments v. Village of Shoreview and Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 226 N.W.2d 306 (Minn. 1975) is unavailing. On close examination, what little this Court said about consideration of mitigating conditions falls well short of creating the rule of law suggested by RDNT and its supporting amici.

The dispute in *C.R. Investments* was over opposition to the approval of a high-density townhouse development. The council there had been told that the developer could build turnaround areas in the driveways in order to eliminate any danger from automobiles backing onto the road. *Id.* at 325. This Court found that vague reservations, without a factual basis, did not support an inference that the traffic aggravation would be "substantial." *Id.* Unlike the current situation, the applicant carried its burden of demonstrating it could adequately address the city's concerns.

Plaintiff cites *Svee* as holding "that a municipality denying a CUP without suggesting or imposing conditions that would bring the proposed use into compliance is evidence that the denial is arbitrary." *App.'s Br.* 46. In *Svee*, this Court found there was simply no evidence to support the city's finding that traffic would have an adverse effect on the neighborhood. 226 N.W.2d at 309. After recognizing the factual and legal insufficiency of all of the city's "purported findings," this Court noted, in dictum, "Finally, and perhaps most importantly, there was no attempt made, either by the opponents or the council, to suggest or to impose conditions which would insure proper landscaping, setbacks, or ingress or egress." *Id.* This single sentence of dictum, in a \*43 ruling reversing a baseless denial, is insufficient to switch the burden to the City, as it would be contrary to the plain language of the statute.

Here, the City considered RDNT's proposed TDMP conditions and found them to be insufficient to avoid injury to the public health, welfare and safety of the residential neighborhood. AAD42; RA45-47. In particular, the City questioned the effectiveness and enforceability of the TDMP. AA283; AA480 at 155:14-20. The SRF traffic study also pointed out its calculations were determined with RDNT's TDMP in place. RA42.

It is undisputed the proposed expansion will increase traffic volumes, directly impacting the adjacent residential neighborhood. See *SRF and URS Traffic Studies*, AAD41-42; RA40, 45. SRF opined the expansion would increase the traffic count by 26%, to a total of 1,447 vehicles. It was rational for the City to determine adding a substantial increase to an already significant traffic problem will lead to a cumulative injurious effect on the neighborhood. In short, a 26% increase in traffic is not minimal, under any analysis.

There were no mitigating measures that would prevent a significant increase in traffic which would exacerbate existing adverse impacts to the adjacent residential neighborhood. SRF noted even with additional TDMP incentives, the potential reduction in trips was only 70 per day. RA42. SRF cautioned a TDMP tends to be most effective in central business districts or heavy transit-oriented developments versus suburban development like this. AA445 at 17:5-10.

A city council member also questioned whether employees would use the transit incentives in Minnesota winters with a bus stop six blocks away. AA479 at 155:14-20. \*44 The SRF traffic study also pointed out its calculations were determined with RDNT's TDMP in place. RA42. Regardless, even if the TDMP plan worked, there would still be a significant increase in traffic which would exacerbate existing adverse impacts to the adjacent residential neighborhood.

The City also considered the nature of the expansion and the impact it could have on traffic. Unlike the existing facilities, each of the 67 units would contain a full kitchen. AA49. The record shows discussion about the common sense conclusion more independent residents occupying units with full kitchens would generate more traffic than a nursing home, such as trips to the grocery store or other errands. RA50; AA446 at 20:2-8, AA447 at 22:17-25, 23:1-3. These units are more like apartments than nursing home rooms. While RDNT's traffic engineer stated the ITE estimate included this concern, the city council has the discretion to place more weight on the actual traffic counts and common sense regarding the impact of the nature of the addition.



Additionally, the record shows the council considered the proposed expansion in the practical context of an increase in residents having retired children able to visit more frequently than previous generations. *AA444 at 10:11-22*. The City also noted the proposed use would increase non-residential vehicle trips such as emergency vehicle trips which would disturb the quiet enjoyment of the surrounding single family residences. *AAD42*.

While RDNT argues it also proposed a “good neighbor policy” to reduce this traffic, it had begun implementing the policy at the time of the public hearing and the \*45 City continued to receive complaints, as the public hearings demonstrate. It was not working.

RDNT seems to argue the City should have given more weight to testimony by RDNT rather than neighborhood testimony. The history of this development demonstrates why the City was wary of RDNT's representations. When the City approved the Meadow Woods expansion in 1987, the campus was required to accommodate all its needs without on-street parking and implement other traffic management measures. *AA21*. RDNT correctly notes the requirement to accommodate its needs without on-street parking and implementing other traffic management measures was not a condition of a conditional use permit in 1987. *Appellant's Brief, p. 49-50*. They were conditions of approval of the final site and building plans. Nonetheless, based on photographs illustrating congested on-street parking and other traffic issues, RDNT failed to adhere to these conditions. The proposed traffic count of 800 trips per day also turned out to be unrealistically optimistic, as the true traffic count is 1,145 trips per day. It can hardly be surprising the City had legitimate concerns whether RDNT could satisfy its representations, particularly when the proposals would be difficult to enforce and monitor. Indeed, one council member pointed out estimates from the 1987 expansion at the facility understated the actual traffic generated by it. *AA480 (p. 155)*. She added:

I know that at least for me at that time we felt we were pretty much pushing this neighborhood to the max then, but we weren't adding beds, so we thought we were kind of keeping things where they were. I'm not comfortable adding another trip to this neighborhood, and no matter what consultant we use, that is a known fact that that's going to happen.

\*46 *Id.* The city council could properly consider testimony from a council member with personal knowledge about the campus's history since it was discussed in the public hearing and RDNT had an opportunity to rebut the testimony. See *Kotten v. Brown County Bd. of Com'rs*, No. A10-1111, 2011 WL 382811, \*5 (Minn. App. Feb. 8, 2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)).

The city council was presented with independent traffic counts, information about average residential traffic counts, and specific evidence by residents which allowed it to make reasonable inferences the projected traffic increase would exacerbate existing compatibility problems. RDNT failed to carry its burden to establish its proposed conditions would adequately mitigate the adverse impacts from this expansion project.

Because the City's determination the proposed use would be injurious to the surrounding neighborhood is supported by a rational basis, with a factual basis in the record, the City's denial of RDNT's application should be affirmed.

## CONCLUSION

The City's findings that RDNT's proposed expansion was in conflict with the comprehensive plan and would be injurious to the surrounding neighborhood are legally sufficient reasons supported by substantial evidence in the record. Accordingly, the City of Bloomington respectfully requests this Court affirm the City's denial of the conditional use permit application.

**Appendix not available.**



## Footnotes

- 1 See Administrative Record submitted to district court.
- 2 RDNT took the position the two existing facilities are only two units with 254 beds. AA403. Thus, staff looked at various methods to determine reasonable unit density. *Id.*
- 3 Metropolitan cities are unique from non-metro cities because the comprehensive plans are also submitted to the Metropolitan Council for review. See Minn. Stat. § 473.858.
- 4 RDNT characterizes SRF as the “City’s expert.” See, e.g., App.’s Br. 11. The record establishes SRF was an independent consultant retained as part of the application process.
- 5 Interestingly, RDNT points out the approval of Applewood Pointe to argue its proposed expansion should similarly be approved but conveniently ignores it when asserting the City did not consider its goal of increasing senior housing. This only highlights the problem with the **location** of the proposed expansion.
- 6 Presbyterian Homes, a quasi-public use with 260,000 square feet and only one entrance ultimately changed to high-density or medium-density residential and one access was not allowed for a 260,000 square foot building. AA453 at 48:10-19. Here, there is only one access for a proposed 321,264 square foot facility.
- 7 RDNT continues to take Janice Olmsted’s statement, “And here’s just a semi, that’s no big deal...” out of context. *Appellant’s Brief*, at p. 43 (citing AA471 p. 121). The city council meeting video depicts Olmsted’s concerned and exasperated tone of voice when discussing the examples of traffic issues. See AR 1131 at VTS.01.4. VOB at 10:05-12:16.
- 8 While a typical two-lane roadway has the capacity to handle approximately 12,000 to 14,000 vehicles per day, no one would seriously argue this volume of traffic would be appropriate for a residential area or a school, for that matter. AA448 at 27:4-6. Consequently, the **physical capacity** of the roadway itself does not resolve the issue of whether the intensity and nature of the traffic is injurious to the surrounding neighborhood.
- 9 Amicus Curiae Ebenezer Society focuses on this argument in its brief. Ebenezer Society states its interest in this case is “to give a voice to the many families seeking care and comfort for the **elderly**.” *Ebenezer Brief*, p. 1. It does not, however, disclose the Ebenezer companies’ **financial** interest in the expansion. According to the record, Ebenezer companies act as an administrator and manager of the campus and plan to purchase the care campus. AA174 at 109:19-22; AA465 at 94:13-21; AA476 at 138:1319